Filed 7/25/19 In re M.L. CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re M.L., a Person Coming Under the Juvenile Court Law.	C087755
SACRAMENTO COUNTY DEPARTMENT OF CHILD, FAMILY AND ADULT SERVICES, Plaintiff and Respondent, v. M.S. et al., Defendants and Appellants.	(Super. Ct. No. JD238734)

M.S., the mother, and M.L., the father of the minor M.L. appeal from the juvenile court's order terminating parental rights and denying their petitions for modification (Welf. & Inst. Code, §§ 366.26, 388, 395).[1]

[1] Undesignated statutory references are to the Welfare and Institutions Code.

Mother contends the trial court abused its discretion in denying her petition for modification for reunification services. Mother and father both assert the juvenile court erred in not ordering reunification services for him as a presumed father. We shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The minor was born in January 2018 in Reno, Nevada. He was taken into protective custody because he and mother tested positive for marijuana and methamphetamine. Mother minimized her substance abuse problems and had secured few resources for her child before birth.

Upon determining mother resided in Sacramento County, the Sacramento County Department of Health and Human Services (DHHS) filed a dependency petition (§ 300) in January 2018 alleging jurisdiction over the minor based on mother's substance abuse, her history of substance abuse, and her failure to reunify with her children in two prior dependency cases.

A social worker interviewed the alleged father, M.L. (father), on the same day the petition was filed. He said that he and mother were not in a relationship but were friends with benefits. He did not know mother was pregnant until November 2017, at which time mother told him he was the father. Father questioned whether he was the child's parent and wanted a DNA test to confirm mother's claim. If found to be the father, he wanted to be a part of the child's life and participate in ongoing court proceedings. Father was from Chicago but was currently transient in Sacramento with no family support. He was on probation in Sacramento County until 2020 due to a possession of a firearm charge.

In January 2018, the juvenile court accepted jurisdiction from Washoe County, Nevada, and detained the minor.

The February 2018 jurisdiction and disposition report related an interview with mother where she admitted to using marijuana daily and had used methamphetamine four or five times when she was pregnant with the minor. She had used methamphetamine the day before the minor was born. Father said he was waiting to find out if the minor was his child. He was living out of his vehicle but would try to find housing if he was found to be the biological father. Father knew mother used methamphetamine and marijuana before they got together and did not expect her to quit. He had two prior felony convictions, the most recent for felon in possession of a firearm in April 2015.

Mother's child welfare history includes having her parental rights terminated in November 2014 as to her child M.S.-C. following a dependency case initiated when the child tested positive for marijuana at birth. A May 2015 dependency case was opened for mother's child D.S. after mother admitted to using methamphetamine and marijuana during her pregnancy. The dependency petition was sustained, reunification services were not offered, and parental rights were terminated in January 2016.

DHHS recommended denying services to mother pursuant to section 361.5, subdivision (b)(10) and (11). While paternity had not been established, even if father was the biological father, DHHS recommended not placing the minor with him as he lacked a home and there were no services to ensure the child's safety. While services were discretionary for father, DHHS asserted that providing father with services was not in the minor's best interests, as father did not believe he was the child's father and was not visiting.

A March 2018 interim report from DHHS related that paternity tests established father as the minor's biological father with a 99.99 percent probability. DHHS reiterated its previous stance on opposing the minor's placement with father and opposing services for him as well.

Neither mother nor father were present at the March 2018 jurisdiction and disposition hearing. The juvenile court found father to be the biological father. It sustained the petition and found by clear and convincing evidence that placement with father would be detrimental to the minor. Services were not offered to mother based on her child welfare history and history of substance abuse. Services were not offered to father for the reasons asserted by DHHS in its reports.

An April 2018 report noted the minor was placed in the home of mother's former foster sister. The caretaker also had guardianship over another of the minor's half-siblings. Mother had weekly visits with the minor, while father was not visiting at the time.

Mother and father filed separate petitions for modification in May 2018. Father requested reunification services and alleged as changed circumstances a declaration of paternity declaring himself as the minor's father, which he and mother signed in April 2018. Mother sought reunification services based on her voluntary participation in numerous services. Attached to her petition was a letter from Volunteers of America indicating she began recovery residential treatment on April 17 and was scheduled to complete the program on July 17, with a six- to nine-month transitional living component. She tested positive for THC on April 17 but was negative on May 11 and May 15. Mother completed 12 sessions of group counseling beginning on February 21, 2018. Also attached were 19 "presumptive positive" tests for THC between January 29 and April 12. Mother also attached a letter from herself to the court as well as prescription documentation.

The June 2018 section 366.26 report related that mother's visits were consistent. While she is usually quiet during visits, mother is attentive to minor's needs. Father had not visited with the minor since the onset of the case. The minor was healthy and

developmentally on track. He remained in his current foster placement and the caregiver was interested in adoption.

Testifying at the contested sections 366.26 and 388 hearing, father said he signed the declaration of paternity once he learned the results of the paternity test. Father started parenting classes, so he could reunify with the minor. He was ready to spend time with the minor once he found out the child was his son. By the time of the July 24 hearing, father had two visits with the minor and scheduled a third. His first visit took place on June 19, after he signed the declaration of paternity and left messages with three different social workers over a period of weeks. Father learned how to burp the minor and put him to sleep after feeding him at the second visit. He described the visits as "excellent," which was why he was "pushing for more." He was willing to participate in and complete services, including substance abuse services.

Father found out he was the minor's biological father when he came to court in March. He signed the declaration of paternity three to four days later and then started calling DHHS and asking for visitation. Following the first visit, the social worker instructed father to call or text for future visits. Father had a part-time job working with his uncle at a hot dog stand. He did not have a residence but was seeking services.

The juvenile court denied both section 388 petitions, finding neither mother nor father had established changed circumstances or that granting their respective petitions was in the minor's best interests. As to father's petition, the juvenile court found the declaration of paternity created a rebuttable presumption of paternity under Family Code section 7611, but father's lack of action rebutted that presumption. According to the juvenile court: "A judgment of paternity is looking for someone who can be found to be responsible for providing child support—resolving questions of biology. A presumed father, in contrast, is someone who has promptly come forward and demonstrated his full commitment to his parental responsibilities, emotional, financial and otherwise," which

father failed to do. Even if the juvenile court were to find father was the presumed father, the court would not order reunification services, since he failed to show changed circumstances or benefit to the minor.

Regarding mother's petition, the juvenile court noted mother's 11-year substance abuse history and the relatively short time, "a matter of weeks," she had shown sobriety. After denying the petitions, the juvenile court terminated parental rights.

DISCUSSION

1.0 Mother's Petition for Modification

Mother contends it was an abuse of discretion for the juvenile court to deny her section 388 petition.

"To prevail on a section 388 petition, the moving party must establish that (1) new evidence or changed circumstances exist, and (2) the proposed change would promote the best interests of the child." (*In re J.T.* (2014) 228 Cal.App.4th 953, 965.) The change of circumstances or new evidence "must be of such significant nature that it requires a setting aside or modification of the challenged prior order." (*Ansley v. Superior Court* (1986) 185 Cal.App.3d 477, 485; see *In re Jamika W.* (1997) 54 Cal.App.4th 1446, 1451.) When reunification services have been terminated and a section 366.26 hearing has already been set, a court assessing the child's best interests must recognize that the focus of the case has shifted from the parents' interest in the care, custody, and companionship of the child to the needs of the child for permanency and stability. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317 (*Stephanie M.*).) The child's best interests "are not to further delay permanency and stability in favor of rewarding" the parent for his or her "hard work and efforts to reunify." (*In re J.C.* (2014) 226 Cal.App.4th 503, 527.) "A petition which alleges merely changing circumstances and would mean delaying the selection of a permanent home for a child to see if a parent, who has repeatedly failed to

reunify with the child, might be able to reunify at some future point, does not promote stability for the child or the child's best interests." (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) We review a juvenile court's denial of a section 388 petition for abuse of discretion. (*In re J.T.*, at p. 965.)

Mother had a lengthy history of substance abuse which led to her losing parental rights as to two of the minor's half-siblings. Substance abuse was manifest in this case, with mother and the minor testing positive for marijuana and methamphetamine when the minor was born. Mother also presented a danger to the child by constant nodding off when holding the minor after birth, which led the nurse to place the baby in the infant nursery to protect the minor. While mother's efforts to address her substance abuse are admirable, they were quite recent relative to her lengthy substance abuse history. At best, she displayed changing rather than changed circumstances, and, in light of the danger her substance abuse posed to the minor, did not establish how granting the petition would be in the minor's best interests. It was not an abuse of discretion for the juvenile court to deny mother's petition.

2.0 Reunification Services for Father Based on Presumed Father Status

Father contends his declaration of paternity entitled him to services; as a presumed father he was entitled to reunification services and the juvenile court committed reversible error in finding otherwise. Mother asserts the same.

"An unwed father's rights and duties under the Uniform Parentage Act of 1973 (UPA), adopted by our Legislature as Family Code section 7600 et seq., substantially depend on whether he is a 'presumed father' within the meaning of Family Code section 7611." (*In re Tanis H.* (1997) 59 Cal.App.4th 1218, 1228.) "Whether a biological father is a 'presumed father' . . . is critical to his parental rights." (*Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 823.) Only " 'presumed fathers' " are entitled to custody and reunification services. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 448-449.)

"In order to become a 'presumed' father, a man must fall within one of several categories enumerated in Family Code section 7611." (*Francisco G. v. Superior Court* (2001) 91 Cal.App.4th 586, 595.) One of the ways in which a man can establish presumed father status pursuant to Family Code section 7611 is "if [he] meets the conditions provided in . . . Chapter 3 (commencing with [Family Code] Section 7570) of Part 2 . . . ." (Fam. Code, § 7611.) Family Code section 7570, and the sections that follow it, address the establishment of paternity by voluntary declaration. "[A] voluntary declaration of paternity that is in compliance with all the requirements of [Family Code] section 7570 et seq. . . . entitles the father to presumed father status in dependency proceedings." (*In re Liam L.* (2000) 84 Cal.App.4th 739, 747; see *In re Raphael P.* (2002) 97 Cal.App.4th 716, 722-723.) Unless rescinded or set aside, a voluntary declaration of paternity has the same force and effect as a judgment of paternity issued by a court of competent jurisdiction. (Fam. Code, § 7573, subd. (a); *Kevin Q. v. Lauren W.* (2009) 175 Cal.App.4th 1119, 1132.)

Father and mother assert father was entitled to reunification services pursuant to section 361.5, subdivision (a), once he became a presumed parent through the voluntary declaration of paternity. (See § 361.5, subd. (a) ["whenever a child is removed from a parent's or guardian's custody, the juvenile court shall order the social worker to provide child welfare services to the child and the child's mother and statutorily presumed father or guardians"].) They claim the juvenile court erred in finding the presumption of paternity established by the voluntary declaration was rebuttable. According to them, once father filed the voluntary declaration of paternity with the juvenile court and requested presumed father status, the juvenile court should have designated him the presumed father and ordered reunification services for him. They conclude that the juvenile court's failure to do so constitutes reversible error.

We agree with father and mother that the juvenile court erred in finding that the voluntary declaration of paternity created a rebuttable presumption of paternity. While a voluntary declaration of paternity can be set aside if the declarant is found not to be the child's father, or due to mistake, inadvertence, excusable neglect, or fraud (see *In re William K.* (2008) 161 Cal.App.4th 1, 9-10), none of those grounds are present here. However, we review the results rather than the reasoning of the juvenile court's decision. (See *Florio v. Lau* (1998) 68 Cal.App.4th 637, 653 ["In reviewing a trial court's decision, we review the result, not the reasoning. A decision right in result will not be reversed because it is based on an erroneous theory"].) Such is the case here.

The parents' argument overlooks the procedural posture of the case when the voluntary declaration of paternity was executed. Before that, the juvenile court had entered jurisdictional and dispositional orders finding father to be the biological father and declining to order reunification services for him. In a juvenile dependency proceeding, the dispositional order is the judgment. (§ 395; *In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1149-1150.) Once the judgment becomes final, it cannot be attacked in an appeal from a subsequent order, such as the appeal before us. (*In re S.B.* (2009) 46 Cal.4th 529, 532.) The only means established by the Legislature to change the dispositional order in a dependency order or ruling is a section 388 petition for modification. In order to change that judgment, father had to file a section 388 petition and show changed circumstances and benefit to justify reunification services at this stage of the dependency.

In re D.R. (2011) 193 Cal.App.4th 1494 (*D.R.*) addressed a very similar situation as this case presents. The child D.R. was born in November 2009 and detained at birth because the mother had a child born the previous year removed from her custody due to substance abuse and her circumstances had not changed since. (See *id.* at p. 1498.) The mother told hospital staff that R.R. was the father and that he lived with her; R.R. denied

being D.R.'s father, denied being the mother's significant other, and refused to sign the birth certificate. (*Id.* at p. 1499.) The juvenile court ordered services and visitation for R.R. at the November 19 detention hearing; test results showing he was the biological father were related to the court on December 14. (*Id*. at pp. 1499-1500.) At the January 29, 2010 jurisdiction and disposition hearing, R.R. testified he had visited D.R. a few times, was " 'pretty sure' " he was the father, and was willing to sign a voluntary declaration of paternity. (*Id.* at p. 1500.) The juvenile court sustained the petition, denied services for the mother pursuant to section 361.5, subdivision (b)(10), (11), and (13), denied R.R. reunification services under section 361.5, subdivision (a), as he was only an alleged father, and set a permanency planning hearing. (*D.R.*, at p. 1501.) On May 18, 2010, R.R. filed a section 388 petition, seeking reunification services and modification of the order finding him an alleged father on the ground that he had executed a voluntary declaration of paternity. (*D.R.*, at p. 1504.) The juvenile court denied the petition, finding R.R. was only an alleged father. (*Id.* at p. 1505.)

On appeal, R.R. contended "his section 388 petition presented new evidence, namely, the voluntary declaration of paternity, which established R.R. as D.R.'s presumed father and qualified him to receive family reunification services." (*D.R., supra,* 193 Cal.App.4th at p. 1507.) The Court of Appeal affirmed, finding the voluntary declaration of paternity had not been properly executed or filed. (*Id.* at pp. 1498, 1509-1510.) It also found R.R. would not prevail even if the voluntary declaration of paternity was valid. (*Id*. at p. 1511.)

The Court of Appeal observed that R.R. filed the declaration more than six months after detention, and thus "after the presumptive term of family reunification services for a child under the age of three years on the date of detention had expired." (*D.R., supra,* 193 Cal.App.4th at p. 1512.) The court also found that D.R. was detained because she

was at risk in the mother's care, and the bond between R.R. and the child was weak. (*Id*. at pp. 1512-1513.) From this, the Court of Appeal concluded:

"Under these circumstances, granting R.R.'s section 388 petition would have been inconsistent with the goals of the dependency proceedings. Once a case has advanced to the permanency planning stage, it is important not only to seek an appropriate permanent solution, but also to implement that solution promptly to minimize the time the child is in legal limbo and to allow the child's caretakers to make a full emotional commitment to the child. [Citation.] Here, the juvenile court properly attempted to give D.R. a stable, permanent placement as promptly as possible. [¶] R.R. asserts he cannot be deprived of an opportunity to develop a parental relationship with D.R. because he did not deny or reject paternity and he did not delay in asserting his interest in the child. [Citation.] However, R.R. did not promptly come forward and claim his role as D.R.'s parent. As has been noted, R.R. refused to acknowledge paternity at the time of D.R.'s birth, he continued to express uncertainty as to his paternity even after testing confirmed he was the child's father, and he delayed for months the filing of the voluntary declaration of paternity. Given these circumstances, the juvenile court properly could conclude it was not in D.R.'s best interests to modify the previous order denying R.R. family reunification services." (*D.R., supra,* 193 Cal.App.4th at p. 1513.)

Unlike *D.R.,* this case did not involve an invalid voluntary declaration of paternity. However, we find the alternative reasoning in *D.R.,* that R.R. would not prevail even with a valid declaration, is dispositive. In that context, the only appreciable difference between *D.R.* and this case is that father here executed the voluntary declaration of paternity and submitted the section 388 petition within the presumptive maximum term for reunification services for a child under the age of three. (See § 361.5, subd. (a)(1)(B).) This is a distinction without a difference here. While the presumed maximum term for services had not yet run, the case was already in the selection and

implementation phase and the minor's current caretaker had expressed an interest in adoption. As services had been terminated, the focus of the case now was on the minor's need for permanency and stability. (*Stephanie M., supra*, 7 Cal.4th at p. 317.) At this stage of the proceedings, a biological father cannot come in at the last minute and upend a child's chance for a permanent and stable home by the mere filing of a voluntary declaration of paternity. Rather, as the *D.R.* court found in its alternate reasoning, a biological or alleged father must satisfy the requisites of section 388 before the dependency can be reset to the reunification phase.

As in *D.R.*, father fails to make that showing here. Like the appellant in *D.R.*, father questioned his paternity through much of the case, and maintained a minimal relationship with the minor, visiting the minor twice, and only after his paternity was established. Even if the declaration of paternity can be considered changed circumstances, father fails to show that providing him services was in the minor's best interests.

Thus, no abuse of discretion occurred in the denial of father's section 388 petition.

DISPOSITION

The orders of the juvenile court are affirmed.

s/BUTZ, J.

We concur:

s/RAYE, P. J.

s/HULL, J.